



**Transportation
Security
Administration**

May 13, 2004

MEMORANDUM FOR David Reese
Senior Environmental Specialist
Department of Homeland Security

THROUGH: Thomas Muther
Attorney Advisor
Department of Homeland Security

FROM: Elizabeth F. Buchanan
Assistant Chief Counsel for
Ethics and General Legal Services

SUBJECT: Administrative Record for Transportation Security
Administration (TSA) Categorical Exclusions

SUMMARY

TSA requested a list of categorical exclusions to be adopted as part of the Department of Homeland Security (DHS) regulations implementing the National Environmental Policy Act (NEPA).¹ We have since agreed with DHS that our proposed categorical exclusions numbers H1, H5, H6, and H8 are encompassed within other proposed categorical exclusions that apply DHS-wide. Therefore, we agreed to drop our request with regard to those proposals. The Council for Environmental Quality (CEQ) has asked for an administrative record to support the balance of the proposals.

¹

CATEGORICAL EXCLUSIONS FOR THE TRANSPORTATION AND SECURITY ADMINISTRATION	
H1	Installation or removal of equipment to screen passengers, baggage, or cargo at existing facilities.
H2	Issuance of grants for the conduct of security-related research and development or the implementation of security plans or other measures at existing facilities.
H3	Issuance of planning documents and advisory circulars on planning for security measures which are not intended for direct implementation or are issued as administrative and technical guidance.
H4	Issuance or revocation of certificates or other approvals, including but not limited to: (a) Airmen certificates (b) Security procedures at general aviation airports (c) Airport security plans
H5	Emergency measures regarding air or ground security.
H6	Training and exercises in planning or adopting security measures or in emergency preparedness.
H7	Approval or disapproval of security plans required under legislative or regulatory mandates unless such plans would have a significant effect on the environment.
H8	Construction that does not significantly alter land use including minor construction within airport facilities to accommodate installation, removal, and operation of security equipment.

All of TSA's proposals are based on existing approved FAA categorical exclusions. TSA uses FAA's categorical exclusions until the DHS NEPA implementing regulation is approved because of the savings clause in the act that created TSA. TSA was created in the Aviation and Transportation Security Act (ATSA), Pub.L. 107-71. As part of that Act, the civil aviation security function was transferred from FAA to TSA. ATSA, section 101(g). ATSA further contains a savings clause, which provided that all "orders, determinations, rules, regulations, permits, grants, loans, contracts, settlements, agreements, certificates, licenses, and privileges – (1) that have been issued, made, granted, or allowed to become effective by the Federal Aviation Administration, any officer or employee thereof, or any other Government official, or by a court of competent jurisdiction, in the performance of any function that is transferred by this Act; and (2) that are in effect on the effective date of such transfer (or become effective after such date pursuant to their terms as in effect on such effective date), shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Under Secretary of Transportation for Security², any other authorized official, a court of competent jurisdiction, or operation of law." ATSA, section 141(b). As a result of this savings clause, all of the regulations of the FAA that were in effect on the date of ATSA (November 19, 2001) continue to apply to TSA, including FAA's NEPA implementation.

TSA was transferred to DHS as a result of the Homeland Security Act of 2002 (HSA), Pub.L. 107-276. HSA, section 403. The HSA also contained a savings clause, which provides that all completed administrative actions of an agency shall not be affected by the enactment of this Act or by the transfer of such agency to the Department but shall continue in effect according to their terms until amended, modified, superseded, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law. HSA, section 1512(a)(1). "Completed administrative actions" for purposes of this section includes orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges. HSA, section 1512(a)(2). As a result of this savings clause, all of the regulations that had applied to TSA on the date of transfer to DHS, including all effective regulations of FAA, continue to apply until superseded.

FAA's regulations for implementing NEPA are found in FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts. See 64 Fed. Reg. 55526 for a description of the existing order plus proposed changes. TSA tailored FAA categorical exemptions that it uses to ensure that they were as narrowly written as possible. The specific categorical exclusions (Cat Ex) upon which TSA relies for its proposals H2, H3, H4, and H7 are:

1. H2: Issuance of grants for the conduct of security-related research and development or the implementation of security plans or other measures at existing facilities.

² ATSA created TSA as an agency within the Department of Transportation and referred to the head of TSA as the Under Secretary of Transportation for Security. Since the transfer of TSA to the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (November 25, 2002), the title of the head of TSA has been administratively changed to "Administrator."

FAA Cat Ex: FAA Order 1050.1D, appendix 3, para 4.g.: Procedural actions requested by users on a test basis to determine the effectiveness of new technology and measurement of possible impacts on the environment.

FAA Cat Ex: Proposed FAA Order 1050.1E, Figure 3-2, Existing Equipment and Implementation Action 5³: Federal financial assistance or Airport Layout Plan (ALP) approval of miscellaneous items including wind indicators, wind measuring devices, landing directional equipment, segmented circles (visual indicators providing traffic pattern information at airports without air traffic control towers) and fencing.

FAA Cat Ex: Proposed FAA Order 1050.1E, Figure 3-2, Existing Equipment and Implementation Action 9⁴: Acquisition of security equipment required by rule or regulation for the safety and security of personnel and property on the airport (14 CFR Part 107, Airport Security), safety equipment required by rule or regulation for certification of an airport (14 CFR part 139, Certification and Operation: Land Airports Serving Certain Air Carriers) or snow removal equipment.

2. H3: Issuance of planning documents and advisory circulars on planning for security measures which are not intended for direct implementation or are issued as administrative and technical guidance.

FAA Cat Ex: FAA Order 1050.1D, chapter 3.a.(5): Policy and planning documents not intended for or which do not cause direct implementation of project or system actions.

FAA Cat Ex: FAA Order 1050.1D, appendix 3, para 4.d.: Actions taken under ... FAR Part 99, "Security Control of Air Traffic."

FAA Cat Ex: Proposed FAA Order 1050.1E, Figure 3-2, Existing Administrative/General Action 7⁵: Issuance of airport policy and planning documents including the National Plan of Integrated Airport Systems (NPIAS), Airport Improvement Program (AIP) priority system, and advisory circulars on planning, design, and development which are issued as administrative and technical guidance.

3. H4: Issuance or revocation of certificates or other approvals, including but not limited to:

- (a) Airmen certificates
- (b) Security procedures at general aviation airports
- (c) Airport security plans

FAA Cat Ex: FAA Order 1050.1D, chapter 3.a.(8): The approval or issuance of certificates covering medicals for airmen, delegated authority, ground

³ Please note that where we have cited the proposed draft FAA Order 1050.1E, we are only using categorical exclusions that are noted as being already approved and in existence.

⁴ Please note that where we have cited the proposed draft FAA Order 1050.1E, we are only using categorical exclusions that are noted as being already approved and in existence.

⁵ Please note that where we have cited the proposed draft FAA Order 1050.1E, we are only using categorical exclusions that are noted as being already approved and in existence.

schools, out-of-agency training and aircraft repair or maintenance not affecting noise, emissions, or wastes.

FAA Cat Ex: FAA Order 1050.1D, Appendix 4, para 4.a.: Certificates for new, amended, or supplemental ... (4) medical, airmen, export, manned free balloon type, glider type, propeller type, supplemental type not affecting noise, emission or waste; and (5) mechanic schools, agricultural aircraft operations, repair stations and other air agency ratings.

FAA Cat Ex: Proposed FAA Order 1050.1E, Figure 3-2, Existing Administrative/General Action 7⁶: Issuance of airport policy and planning documents including the National Plan of Integrated Airport Systems (NPIAS), Airport Improvement Program (AIP) priority system, and advisory circulars on planning, design, and development which are issued as administrative and technical guidance.

FAA Cat Ex: FAA Order 1050.1D, appendix 3, para 4.d.: Actions taken under ... FAR Part 99, "Security Control of Air Traffic."

4. H7: Approval or disapproval of security plans required under legislative or regulatory mandates unless such plans would have a significant effect on the environment.

FAA Cat Ex: FAA Order 1050.1D, Appendix 4, para 4.k.: Regulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment).

FAA Cat Ex: FAA Order 1050.1D, appendix 3, para 4.d.: Actions taken under ... FAR Part 99, "Security Control of Air Traffic."

⁶ Please note that where we have cited the proposed draft FAA Order 1050.1E, we are only using categorical exclusions that are noted as being already approved and in existence.